

# APPENDIX I

## RECOMMENDATIONS AND COMMENTARY

### Preamble

Appendix I includes the recommendations and accompanying commentary contained in Part II of the report prepared by the Defender Services Committee's Subcommittee on Federal Death Penalty Cases entitled, *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* (report). The Judicial Conference of the United States adopted the recommendations in the report on September 15, 1998. The commentary accompanying the report has not been approved by the Judicial Conference, but is included in Appendix I, as it expands upon the recommendations, discusses the role of federal defender organizations in federal death penalty cases, and generally provides practical information that is useful to judges and appointed counsel in the management of a federal death penalty case.

### 1. Qualifications for Appointment.

- a. Quality of Counsel. Courts should ensure that all attorneys appointed in federal death penalty cases are well qualified, by virtue of their prior defense experience, training and commitment, to serve as counsel in this highly specialized and demanding type of litigation. High quality legal representation is essential to assure fair and final verdicts, as well as cost-effective case management.
- b. Qualifications of Counsel. As required by statute, at the outset of every capital case, courts should appoint two counsel, at least one of whom is experienced in and knowledgeable about the defense of death penalty cases. Ordinarily, "learned counsel" should have distinguished prior experience in the trial, appeal, or post-conviction review of federal death penalty cases, or distinguished prior experience in *state* death penalty trials, appeals, or post-conviction review that, in combination with co-counsel, will assure high quality representation.
- c. Special Considerations in the Appointment of Counsel on Appeal. Ordinarily, the attorneys appointed to represent a death-sentenced federal appellant should include at least one attorney who did not represent the appellant at trial. In appointing appellate counsel, courts should, among other relevant factors, consider:
  - i. the attorney's experience in federal criminal appeals and capital appeals;
  - ii. the general qualifications identified in paragraph 1(a), above; and

- iii. the attorney's willingness, unless relieved, to serve as counsel in any post-conviction proceedings that may follow the appeal.
- d. Special Considerations in the Appointment of Counsel in Post-Conviction Proceedings. In appointing post-conviction counsel in a case where the defendant is sentenced to death, courts should consider the attorney's experience in federal post-conviction proceedings and in capital post-conviction proceedings, as well as the general qualifications set forth in paragraph 1(a).
- e. Hourly Rate of Compensation for Counsel. The rate of compensation for counsel in a capital case should be maintained at a level sufficient to assure the appointment of attorneys who are appropriately qualified to undertake such representation.

### **Commentary**

As Recommendation 1(a) indicates, the first responsibility of the court in a federal death penalty case is to appoint well-trained, experienced and dedicated defense counsel. Federal law requires the appointment of two counsel to represent a defendant in a federal death penalty case, of whom at least one must be “learned in the law applicable to capital cases.” 18 U.S.C. § 3005. Additional requirements relating to counsel’s experience are codified at 21 U.S.C. § 848(q)(5)-(7). Legislatures, courts, bar associations, and other groups that have considered the qualifications necessary for effective representation in death penalty proceedings have consistently demanded a higher degree of training and experience than that required for other representations. Such heightened standards are required to ensure that representation is both cost-effective and commensurate with the complexity and high stakes of the litigation. The standards listed in Recommendations 1(b) - (d) are designed to assist courts in identifying the specific types of prior experience which have been deemed most valuable in the experience of

the federal courts thus far. They emphasize the importance of bringing to bear both death penalty expertise and experience in the practice of criminal defense in the federal courts.

Recommendation 1(b) calls for the appointment of specially qualified counsel “at the outset” of a case, because virtually all aspects of the defense of a federal death penalty case, beginning with decisions made at the earliest stages of the litigation, are affected by the complexities of the penalty phase. Early appointment of “learned counsel” is also necessitated by the formal “authorization process” adopted by the Department of Justice to guide the Attorney General's decision-making regarding whether to seek imposition of a death sentence. (See United States Attorney’s Manual § 9-10.000.) Integral to the authorization process is a presentation to Justice Department officials of the factors which would justify not seeking a death sentence against the defendant. A “mitigation investigation” therefore must be undertaken at the commencement of the representation. Since an early decision not to seek death is the least costly way to resolve a potential capital charge, a prompt preliminary mitigation investigation leading to effective advocacy with the Justice Department is critical both to a defendant’s interests and to sound fiscal management of public funds.

Trial courts should appoint counsel with “distinguished prior experience” (Recommendation 1(b)) in death penalty trials or appeals, even if meeting this standard requires appointing a lawyer from outside the district in which a matter arises. The preparation of a death penalty case for trial requires knowledge, skills and abilities which are absent in even the most seasoned felony trial lawyers, if they lack capital experience. An attorney knowledgeable about the nature of capital pretrial litigation, the scope of a mitigation investigation and the impact of the sentencing process on the guilt phase is indispensable and generally produces cost

efficiencies. The costs of travel and other expenses associated with “importing” counsel from another jurisdiction can be minimized with careful planning by counsel and the court. With appropriate forethought, investigations, client counseling, court appearances and other obligations can be coordinated to maximize the efficient use of counsel’s time and ensure cost-effectiveness.

Recommendations 1(c) and (d), with respect to the appointment of appellate and post-conviction counsel, respond to the requirement of 21 U.S.C. § 848(q) that representation in death penalty cases continue through post-conviction proceedings. Because trial counsel ordinarily will be precluded by a conflict of interest from representing the defendant in a post-conviction proceeding under 28 U.S.C. § 2255, continuity of representation and the efficient use of resources generally will best be achieved by appointing, at the appellate stage, at least one new lawyer who may continue to provide representation in any post-conviction proceedings. This should promote continuing representation by a lawyer who is already familiar with the record. In determining which, if any, of a death-sentenced defendant’s prior counsel to appoint as post-conviction or appellate counsel, courts should consult with those counsel, the district’s federal defender organization and/or the Administrative Office. (See Recommendation 2.)

Recommendation 1(e) reflects the fact that appropriate rates of compensation are essential to maintaining the quality of representation required in a federal capital case. The time demands of these cases are such that a single federal death penalty representation is likely to become, for a substantial period of time, counsel’s exclusive or nearly exclusive professional commitment. It is therefore necessary that the hourly rate of compensation be fair in relation to the costs associated with maintaining a criminal practice. Federal statute currently provides for an hourly

rate of up to \$125 (21 U.S.C. § 848 (q)(10)(A)), which the Subcommittee finds to be adequate at the present time. However, this figure should be reviewed at least every three years, to ensure that it remains sufficient in light of inflation and other factors.

(See 18 U.S.C. § 3006A(d)(1).)

## **2. Consultation with Federal Defender Organizations or the Administrative Office.**

- a. Notification of Statutory Obligation to Consult. The Administrative Office of the U.S. Courts (Administrative Office) and federal defender organizations should take appropriate action to ensure that their availability to provide statutorily mandated consultation regarding the appointment of counsel in every federal death penalty case is well known to the courts. (See 18 U.S.C. § 3005.)
- b. Consultation by Courts in Selecting Counsel. In each case involving an offense punishable by death, courts should, as required by 18 U.S.C. § 3005, consider the recommendation of the district's Federal Public Defender (FPD) (unless the defender organization has a conflict) about the lawyers to be appointed. In districts not served by a Federal Public Defender Organization, 18 U.S.C. § 3005 requires consultation with the Administrative Office. Although not required to do so by statute, courts served by a Community Defender Organization should seek the advice of that office.
- c. Consultation by Federal Defender Organizations and the Administrative Office in Recommending Counsel. In discharging their responsibility to recommend defense counsel, FDOs and the Administrative Office should consult with Federal Death Penalty Resource Counsel in order to identify attorneys who are well qualified, by virtue of their prior defense experience, training and commitment, to serve as lead and second counsel.

## Commentary

Since 1994, courts have been required to consider the recommendation of their federal public defender organization<sup>1</sup> or the Administrative Office regarding the appointment of counsel in each federal death penalty case. The Administrative Office has notified courts of this relatively recent innovation, and it has been largely followed and yielded results satisfying to judges, defense counsel and prosecutors. In a small number of cases, however, the Subcommittee found that courts had ignored or been unaware of the consultation requirement. For that reason, Recommendation 2(a) suggests that the Administrative Office take further steps to ensure that all courts are familiar with their obligations in this area and with the nature of the assistance which will be provided to them upon their request (see Commentary accompanying Recommendation 2(c)).

Recommendation 2(b) reflects the Subcommittee's view that recommendations concerning appointment of counsel are best obtained on an individualized, case-by-case basis. The relative infrequency of federal death penalty appointments, and the typically swift response which any court requesting a recommendation can expect, makes lists or "panels" of attorneys both unnecessary, and in some respects, impractical. Currently, within approximately 24 hours

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<sup>1</sup> A district court which chooses to provide representation through a federal defender organization may elect one of two organizational models. A Federal Public Defender Organization (FPDO) is a federal agency, headed by a Federal Public Defender who is selected by the Circuit Court of Appeals. The attorneys and other staff of a federal public defender organization are government employees. A Community Defender Organization (CDO) is a not-for-profit corporation governed by a board of directors and led by an executive director. Both types of organization are funded and administered by the federal judiciary pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A. The term "federal defender organization," or "FDO," as used in this report, includes both organizational models.

of receipt of a request, the Administrative Office or federal defender provides the court with the names of attorneys who not only are qualified to serve as counsel but who also have been contacted and indicated their willingness to serve in the particular case.<sup>2</sup> These individualized recommendations help to ensure that counsel are well-suited to the demands of a particular case and compatible with one another and the defendant. Case-specific consultation is also required by existing Judicial Conference policy (see paragraph 6.01B of the Guidelines for the Criminal Justice Act (CJA Guidelines), Volume VII, *Guide to Judiciary Policies and Procedures*, explaining the 18 U.S.C. § 3005 consultation requirement and suggesting that in developing a recommendation, consideration be given to “the facts and circumstances of the case.”).

Recommendation 2(b) also suggests that in districts served by a Community Defender Organization (rather than a Federal Public Defender Organization) courts extend the statutory requirement and seek the recommendation of the head of that organization about appointment of counsel in federal death penalty cases. The omission of specific reference to Community Defender Organizations in the statute is not explained in any legislative history, and consultation with a Community Defender Organization is likely to be as valuable as consultation with a Federal Public Defender Organization.

To assist federal defender organizations and the Administrative Office in discharging their responsibility to recommend counsel, the judiciary has contracted with three Federal Death

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<sup>2</sup> The distinction between being qualified to serve and willing to do so is significant. Most defense counsel interviewed by the Subcommittee indicated that they would not be willing to accept appointment to more than one federal death penalty case at a time. Furthermore, since accepting a federal death penalty appointment requires a substantial time commitment which may ultimately cause the attorney to become entirely unavailable for any other fee-generating work, appointment to such a case is not lightly undertaken.

Penalty Resource Counsel, experienced capital litigators whose work is described in Section C.2 of Part I of the report. Recommendation 2(c) recognizes the value of the assistance provided by Resource Counsel and urges federal defenders and the Administrative Office to continue to work closely with them. Resource Counsel are knowledgeable about and maintain effective communication with defense counsel nationwide. Their ability promptly to match attorneys with cases is of great value to the judiciary.

### **3. Appointment of More Than Two Lawyers.**

Number of Counsel. Courts should not appoint more than two lawyers to provide representation to a defendant in a federal death penalty case unless exceptional circumstances and good cause are shown. Appointed counsel may, however, with prior court authorization, use the services of attorneys who work in association with them, provided that the employment of such additional counsel (at a reduced hourly rate) diminishes the total cost of representation or is required to meet time limits.

#### **Commentary**

The norm in federal death penalty cases is the appointment of two counsel per defendant. More than two attorneys should be appointed only in exceptional circumstances. Courts contemplating the appointment of a third counsel might consider contacting the Administrative Office for information and advice about whether circumstances warrant such appointment. Notwithstanding this suggested limit on the number of attorneys charged with responsibility for the defense in its entirety, courts are encouraged to permit appointed counsel to employ additional attorneys to perform more limited services where to do so would be cost-effective or otherwise enhance the effective use of resources. For example, in many federal death penalty cases the prosecution provides to defense counsel an extensive amount of discovery material which must be reviewed for relevance and organized for use by the defense. Providing legal



assistance to appointed counsel at a lower hourly rate may prove economical or it may be a necessity in light of court deadlines. This is consistent with existing Judicial Conference policy with respect to all Criminal Justice Act representations (see CJA Guideline 2.11A), and is emphasized here because of its cost containment potential in capital litigation.

#### **4. Appointment of the Federal Defender Organization (FDO).**

- a. FDO as Lead Counsel. Courts should consider appointing the district's FDO as lead counsel in a federal death penalty case only if the following conditions are present:
  - i. the FDO has one or more lawyers with experience in the trial and/or appeal of capital cases who are qualified to serve as “learned counsel”; and
  - ii. the FDO has sufficient resources so that workload can be adjusted without unduly disrupting the operation of the office, and the lawyer(s) assigned to the death penalty case can devote adequate time to its defense, recognizing that the case may require all of their available time; and
  - iii. the FDO has or is likely to obtain sufficient funds to provide for the expert, investigative and other services reasonably believed to be necessary for the defense of the death penalty case.
- b. FDO as Second Counsel. Courts should consider appointing the district's FDO as second counsel in a federal death penalty case only if the following conditions are present:
  - i. the FDO has sufficient resources so that workload can be adjusted without unduly disrupting the operation of the office, and the lawyer(s) assigned to the death penalty case can devote adequate time to its defense, recognizing that the case may require all of their available time; and
  - ii. the FDO has or is likely to obtain sufficient funds to provide for the expert, investigative and other services reasonably believed to be necessary for the defense of the death penalty case.

## **Commentary**

Federal defender organizations have provided representation in only a small number of the federal death penalty cases filed to date. In many cases, representation by defender organizations has been precluded because of conflicts of interest which arise because the organization has represented either another defendant or a witness in the case. Even where the defender organization is not disqualified by a conflict, however, there are good reasons to proceed with caution in making appointments in this area. A decision to appoint a defender organization either as lead or as second counsel in a capital case should be made only after consideration of the factors identified in this Recommendation and consultation between the court and the federal defender.

Recommendation 4(a) is intended to inform courts, which are accustomed to relying on federal defenders to undertake the most difficult representations, that few federal defender attorneys currently possess appropriate qualifications and experience to act as lead counsel in a federal death penalty case. Because violent felony offenses, particularly homicides, rarely are prosecuted in the federal courts, there is little opportunity for federal court practitioners to learn even the fundamentals relevant to the guilt phase defense of a federal death penalty case. Unless they gained such experience in state court before joining the defender organization, most federal defender attorneys have little to no experience defending a homicide case; of those who did bring with them such state court background, few have capital experience.

Notwithstanding these considerations, however, there is much to be gained from the involvement of a defender organization in the defense of a federal capital case. Recommendation 4(b) suggests pairing a defender organization as co-counsel with an experienced capital litigator,

an approach which has successfully been employed in some cases. In these cases, the defender organization has benefitted from the expertise of the “learned counsel” and gained valuable capital litigation experience as well. At the same time, the “learned counsel” has benefitted from the institutional resources and local court expertise of the defender staff. Whether as lead or second counsel,<sup>3</sup> a federal defender organization should not be required to undertake more than one federal death penalty representation at a time unless the head of the organization believes such an arrangement is appropriate. Recommendations 4(a) and (b) acknowledge that capital cases inevitably and seriously disrupt the normal functioning of an office. To undertake too much death penalty litigation would seriously threaten the effective performance of a defender organization’s overriding responsibility to provide representation to a substantial number of financially eligible criminal defendants in its district each year.

## **5. The Death Penalty Authorization Process.**

- a. Streamlining the Authorization Process. The Department of Justice should consider adopting a “fast track” review of cases involving death-eligible defendants where there is a high probability that the death penalty will not be sought.
- b. Court Monitoring of the Authorization Process. Courts should exercise their supervisory powers to ensure that the death penalty authorization process proceeds expeditiously.

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<sup>3</sup> In a very small number of cases, federal defender organizations have served as both lead and second counsel, without the assistance of a panel attorney; such appointments should not be made unless the federal defender believes it is in the best interests of the client and the organization.

## **Commentary**

A decision not to seek the death penalty against a defendant has large and immediate cost-saving consequences. The sooner that decision is made, the larger the savings. Since the death penalty ultimately is sought against only a small number of the defendants charged with death-punishable offenses, the process for identifying those defendants should be as expeditious as possible in order to preserve funding and minimize the unnecessary expenditure of resources. Recommendation 5(a) calls upon the Department of Justice to increase the speed with which it makes decisions not to authorize seeking the death penalty. Recommendation 5(b) urges judges to oversee the authorization process by monitoring the progress of the decisionmaking and imposing reasonable deadlines on the prosecution in this regard. Courts should also ensure that the prosecution's timetables allow for meaningful advocacy by counsel for the defendant.

### **6. Federal Death Penalty Resource Counsel.**

- a. Information from Resource Counsel. In all federal death penalty cases, defense counsel should obtain the services of Federal Death Penalty Resource Counsel in order to obtain the benefit of model pleadings and other information that will save time, conserve resources and enhance representation. The judiciary should allocate resources sufficient to permit the full value of these services to be provided in every case.
- b. Technology and Information Sharing. The Administrative Office should explore the use of computer-based technology to facilitate the efficient and cost-effective sharing of information between Resource Counsel and defense counsel in federal death penalty cases.

## **Commentary**

Recommendation 6(a) urges the judiciary and counsel to maximize the benefits of the Federal Death Penalty Resource Counsel Project (described in Section C.2 of Part I of the

report), which has become essential to the delivery of high quality, cost-effective representation in federal death penalty cases, and to ensure the Project's continued effectiveness.

Recommendation 6(b) recognizes that recent innovations in computer technology are making it increasingly easy and inexpensive for individuals who are geographically dispersed to share information. The Administrative Office should explore the feasibility and cost-effectiveness of using computer and other technology to enhance the delivery of support to appointed counsel in federal death penalty cases.

## **7. Experts.**

- a. Salaried Positions for Penalty Phase Investigators. The federal defender program should consider establishing salaried positions within FDOs for persons trained to gather and analyze information relevant to the penalty phase of a capital case. FDOs should explore the possibility that, in addition to providing services in death penalty cases to which their FDO is appointed, it might be feasible for these investigators to render assistance to panel attorneys and to other FDOs.
- b. Negotiating Reduced Rates. Counsel should seek to contain costs by negotiating reduced hourly rates and/or total fees with experts and other service providers.
- c. Directory of Experts. A directory of experts willing to provide the assistance most frequently needed in federal death penalty cases, and their hourly rates of billing, should be developed and made available to counsel.

## **Commentary**

Penalty phase investigators, or "mitigation specialists," as they have come to be called, are individuals trained and experienced in the development and presentation of evidence for the penalty phase of a capital case. Their work is part of the existing "standard of care" in a federal death penalty case. (See Section B.7 of Part I of the report.) Because the hourly rates charged by mitigation specialists are lower than those authorized for appointed counsel, employment of a

mitigation specialist is likely to be a cost-effective approach to developing the penalty phase defense.

Mitigation specialists are, however, in short supply. In most of the federal death penalty cases the Subcommittee examined, penalty phase investigators were not available locally. Courts thus were required to pay for the costs of travel and related expenses in addition to paying the mitigation specialist's hourly rates. Recommendation 7(a) suggests ameliorating this problem by employing and training persons for this work in federal defender organizations. Because of the cost containment potential, the feasibility of having these salaried employees work not only on cases to which their federal defender organization is appointed, but on others within their region, should be explored as well.

Recommendation 7(b) encourages counsel to negotiate a reduced hourly rate for expert services whenever possible. Private experts must be employed in death penalty cases, but the cost of their services can and should be contained. When asked to provide services for the defense of an indigent criminal defendant, many experts are willing to accept fees lower than their customary hourly rates for private clients. In addition, courts and counsel should agree in advance to a total amount which may be expended for a particular expert. If it appears that costs will exceed the agreed-upon amount, counsel should return to the court for prior authorization to secure them. If travel costs are to be incurred, government rates should be obtained.

## **8. Training.**

Federal Death Penalty Training Programs. The Administrative Office should continue to offer and expand training programs designed specifically for defense counsel in federal death penalty cases.

## **Commentary**

All of the defense counsel interviewed by the Subcommittee stressed the importance of participating in specialized death penalty training programs. Although the individuals appointed as “learned counsel” comprised a highly experienced group of lawyers, they nevertheless continued to attend training programs to update and refine their skills and knowledge, and emphasized that they availed themselves of such opportunities whenever possible. There are, however, very few training programs anywhere in the country specializing in the defense of death penalty cases, and there is only one — an annual one-day program organized by the Federal Death Penalty Resource Counsel Project and funded by the Administrative Office — focusing entirely on federal death penalty representation. Almost all of the defense counsel the Subcommittee interviewed had attended this program and identified it as a significant resource. With the case law relatively undeveloped and so many issues being litigated for the first time, the opportunity for counsel to benefit from the research of others and to share information and ideas was considered especially important and cost-effective. The Administrative Office and Federal Death Penalty Resource Counsel should ensure that training opportunities continue to meet the needs of appointed counsel in this area.

### **9. Case Budgeting.**

- a. Consultation with Prosecution. Upon learning that a defendant is charged with an offense punishable by death, courts should promptly consult with the prosecution to determine the likelihood that the death penalty will be sought in the case and to find out when that decision will be made.
- b. Prior to Death Penalty Authorization. Ordinarily, the court should require defense counsel to submit a litigation budget encompassing all services (counsel, expert, investigative and other) likely to be required through the time that the Department of Justice (DOJ) determines whether or not to authorize the death penalty.

- c. After Death Penalty Authorization. As soon as practicable after the death penalty has been authorized by DOJ, defense counsel should be required to submit a further budget for services likely to be needed through the trial of the guilt and penalty phases of the case. In its discretion, the court may determine that defense counsel should prepare budgets for shorter intervals of time.
- d. Advice from Administrative Office and Resource Counsel. In preparing and reviewing case budgets, defense counsel and the courts should seek advice from the Administrative Office and Federal Death Penalty Resource Counsel, as may be appropriate.
- e. Confidentiality of Case Budgets. Case budgets should be submitted ex parte and should be filed and maintained under seal.
- f. Modification of Approved Budget. An approved budget should guide counsel's use of time and resources by indicating the services for which compensation is authorized. Case budgets should be re-evaluated when justified by changed or unexpected circumstances, and should be modified by the court where good cause is shown.
- g. Payment of Interim Vouchers. Courts should require counsel to submit vouchers on a monthly basis, and should promptly review, certify and process those vouchers for payment.
- h. Budgets In Excess of \$250,000. If the total amount proposed by defense counsel to be budgeted for a case exceeds \$250,000, the court should, prior to approval, submit such budget for review and recommendation to the Administrative Office.
- i. Death Penalty Not Authorized. As soon as practicable after DOJ declines to authorize the death penalty, the court should review the number of appointed counsel and the hourly rate of compensation needed for the duration of the proceeding pursuant to CJA Guideline 6.02.B(2).
- j. Judicial Conference Guidelines. The Judicial Conference should promulgate guidelines on case budgeting for use by the courts and counsel.
- k. Judicial Training for Death Penalty Cases. The Federal Judicial Center should work in cooperation with the Administrative Office to provide training for judges in the management of federal death penalty cases and, in particular, in the review of case budgets.



## **Commentary**

The Judicial Conference has endorsed the use of case budgets to manage the cost of capital habeas corpus cases. (CJA Guideline 6.02.F.) Case budgets for federal death penalty cases are designed to serve purposes similar to those accomplished by case budgets for capital habeas corpus cases. A complete case budget will require the lawyer to incorporate cost considerations into litigation planning and will encourage the use of less expensive means to achieve the desired end. For example, a budget might request appointment of an expert to perform a task that could be accomplished by a lawyer, justifying the request by showing that the expert's work will produce a corresponding reduction in the attorney hours required.

Submission and review of a budget will also assist the court in monitoring the overall cost of representation in the case, and determining the reasonableness of costs. Case budgets are increasingly being requested by courts or submitted by lawyers in federal death penalty cases. Most judges and lawyers interviewed by the Subcommittee were receptive to the idea of case budgeting, provided that persons with expertise in the defense of federal death penalty cases were available to assist in the development or the review of a case budget. Recommendation 9(d) encourages courts and counsel to seek such assistance from the Administrative Office and Federal Death Penalty Resource Counsel.

Because of the unpredictability of pretrial litigation, it is impractical to require counsel to budget for an entire case from start to finish. At a minimum, the budgeting process should be in two stages, as suggested in Recommendations 9(b) and (c). The first stage begins when the lawyer is sufficiently familiar with the case to be able to present a budget reasonably related to the anticipated factual and legal issues in the case and continues until the Department of Justice

makes its decision as to whether it will seek the death penalty. If a death penalty notice is filed, a further budget should be prepared. The court may require a single budget from authorization to trial, or a series of budgets covering shorter increments of time. If the prosecution will not seek the death penalty, Recommendation 9(i) calls for the court to review the case in accordance with CJA Guideline 6.02.B(2), to determine whether the number or compensation of counsel should be reduced.

Because case budgeting is time consuming, and because federal death penalty cases in which the prosecution decides not to seek the death penalty cost much less than cases in which the death penalty is authorized, it may not be cost-effective for counsel to prepare a case budget if authorization is improbable. For this reason, Recommendation 9(a) encourages courts to inquire of the prosecution whether authorization is unlikely. Furthermore, inquiring into the date by which the authorization decision will be made will provide information about how long a period the initial budget should cover, which will assist courts in reviewing budgets. If a significant mitigation investigation is to be undertaken, the Subcommittee recommends that a budget be developed for this work.

Recommendation 9(e) calls for case budgets to be submitted ex parte and maintained permanently under seal. A case budget requires defense counsel to spell out the overall litigation plan for the case. Consequently, it is an extremely sensitive document and contains privileged information. This approach is consistent with Judicial Conference policy regarding capital habeas case budgets. (CJA Guideline 6.02F.)

Review of case budgets greater than \$250,000 by the Administrative Office should assist courts in determining whether the cost of representation is reasonable in light of experience in other similar cases and in identifying areas in which expenses might be reduced.

#### **10. Case Management.**

- a. Non-Lawyer Staff. Where it will be cost-effective, courts should consider authorizing payment for services to assist counsel in organizing and analyzing documents and other case materials.
- b. Multi-defendant Cases.
  - i. Early Decision Regarding Severance. Courts should consider making an early decision on severance of non-capital from capital co-defendants.
  - ii. Regularly Scheduled Status Hearings. Status hearings should be held frequently, and a schedule for such hearings should be agreed upon in advance by all parties and the court.
  - iii. "Coordinating Counsel." In a multi-defendant case (in particular a multi-defendant case in which more than one individual is eligible for the death penalty), and with the consent of co-counsel, courts should consider designating counsel for one defendant as "coordinating counsel."
  - iv. Shared Resources. Counsel for co-defendants should be encouraged to share resources to the extent that doing so does not impinge on confidentiality protections or pose an unnecessary risk of creating a conflict of interest.
  - v. Voucher Review. In large multi-defendant cases, after approving a case budget, the court should consider assigning a magistrate judge to review individual vouchers. The court should meet with defense counsel at regular intervals to review spending in light of the case budget and to identify and discuss future needs.

#### **Commentary**

Recommendation 10(a) recognizes that the large volume of discovery materials and pleadings associated with a federal death penalty case may make it cost-effective for courts to

authorize (and appointed counsel to employ) the services of law clerks, paralegals, secretaries or others to perform organizational work which would otherwise have to be performed by counsel at a higher hourly rate. (See also Commentary accompanying Recommendation 3, endorsing the practice of authorizing counsel to obtain the services of additional attorneys under appropriate circumstances.) Judicial Conference policy provides that, in general, appointed counsel may not be reimbursed for expenses deemed part of their office overhead (CJA Guideline 2.28); however, unusual expenses of this nature may be compensated (CJA Guideline 3.16). The Guidelines suggest that in determining whether an expense is unusual or extraordinary, “consideration should be given to whether the circumstances from which the need arose would normally result in an additional charge to a fee paying client over and above that charged for overhead expenses” (CJA Guideline 3.16).

Recommendations 10(b)(i) - (iv) address some of the particular management burdens associated with multi-defendant federal death penalty cases. Special efforts are required to ensure the orderly administration of justice in these matters, which tend to become costly and cumbersome for courts and counsel.

Recommendation 10(b)(i) suggests that courts make early decisions concerning severance of non-capital from capital co-defendants. In general, capital cases remain pending longer than non-capital cases and involve far greater amounts of pre-trial litigation. Separating the cases of non-capital co-defendants, where appropriate, may lead to swifter and less costly dispositions in those cases. The earlier such a decision is implemented, the greater will be the cost savings.

Recommendation 10(b)(ii) suggests that courts schedule frequent status hearings so that discovery and other matters may proceed efficiently and so that problems may be noted early and

swiftly resolved. If the schedule for such status hearings (on a monthly or other basis) is agreed upon in advance, then all parties can plan accordingly and valuable time will not be wasted while counsel and judges try to find a mutually convenient time for their next meeting.

Recommendation 10(b)(iii) suggests that, if all counsel agree, courts consider designating the attorneys for one defendant as “coordinating counsel.” Coordinating counsel might be responsible for arranging the efficient filing and service of motions and responses among the co-defendants, scheduling co-counsel meetings and court dates, facilitating discovery, or any other tasks deemed appropriate by counsel and the court. In multi-defendant cases where the federal defender organization represents a defendant eligible for the death penalty, courts should (taking into account the views of the federal defender) consider designating the FDO as coordinating counsel because of its institutional capabilities. In the event that a panel attorney is designated as coordinating counsel, the additional time and resources demanded by this role should be compensated.

#### **11. Availability of Cost Data.**

The Administrative Office should improve its ability to collect and analyze information about case budgets and the cost of capital cases.

#### **Commentary**

Only because there have been a comparatively small number of federal death penalty cases was it possible to assemble -- by painstaking manual collection -- the cost data relied upon by the Subcommittee. This process was necessitated by the limitations of the only available information source, the CJA payment system. The Administrative Office is in the process of replacing that system. Given the heightened significance of capital case costs to the federal

defender program, the Administrative Office should give priority to ensuring that its new system will provide capital case data which is accurate, reliable and accessible. In addition, the Administrative Office should continuously track capital case costs so that the impact of appellate and post-conviction litigation can be analyzed, trends in case costs can be readily identified, and appropriate cost-containment mechanisms can be developed.